IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1213

ROBERT WILLIAM DELANEY,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

On Appeal from the Supreme Court of the State of Florida

APPELLANT RESPONSE TO MOTION TO DISMISS APPEAL

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The omission in the Notice of Appeal of reference to the opinion of the Supreme Court of Florida was an oversight, and counsel were not aware of it at the time they undertook preparation of, and the filing of, the

Notice of Appeal. It is apparent now, however, that the omission was simply a scrivener's error, and that notwithstanding this omission there has been substantial compliance with Rule 10. Appellee has not been prejudiced and indeed has not suggested any prejudice in its motion[1]. Accordingly, and for the further reasons set forth below, Appellant submits that the omission is a technical irregularity constituting harmless error and not affording a basis for dismissal:

1. Pursuant to the requirements of Rule 11, the Notice of Appeal (a) was filed with the clerk of the court possessed of the record, i.e., the Supreme Court of Florida (and bears the caption of that Court); and (b) was filed within 90 days after the entry of the opinion of that Court.

2. Pursuant to Section 2 of Rule 10, the Notice of Appeal includes a designation to the Clerk of the Supreme Court of Florida — not the clerk of the Circuit Court — of the portions of the record to be certified.

3. The Notice of Appeal and all pleadings subsequent thereto in state court were filed with the Supreme Court of Florida, not with the Circuit Court.

4. Pursuant to Section 1 of Rule 13, Appellant filed a Motion with the Supreme Court of Florida for extension of time for filing the jurisdictional statement, and an order was entered by that Court granting the extension. Neither the Motion nor the Order was contested in any way by Appellee.

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[1]The motion was received by counsel for Appellant on April 22, 1967.

5. Any ambiguity that may have inhered in the Notice of Appeal was dispelled by the Jurisdictional Statement, which clearly set forth that the judgment under attack was that of the Supreme Court of Florida, dated September 28, 1966, which had affirmed the earlier judgment of the Circuit Court.

Appellant has found no reported decisions construing Rule 10 in circumstances similiar to those at bar—and Appellee has cited none in support of its Motion. Analogous rulings, however, have been made by the Court in certiorari proceedings, in construing the Federal Rules of Civil Procedure, and in construing Rule 37 of the Federal Rules of Criminal Procedure. In addition, Florida law supports Appellant's position. The authorities are as follows:

1. **Certiorari proceedings.** *Callender* v. *Florida*, 380 U.S. 519; 14 L.Ed. 2d 265; 85 S.Ct. 1325 (1965) initially came to the Court on petition for writ of certiorari to the Supreme Court of Florida. The writ was granted and the mandate issued. However, on remand, the Supreme Court of Florida, in its opinion at 181 So. 2d 529 (1966), held that it lacked jurisdiction to comply with this Court's mandate on the ground that (1) the Petitioners had exhausted their state remedies at the level of the District Court of Appeal; (2) the earlier judgment of the Supreme Court of Florida dismissing the appeal to that Court from the judgment of the District Court of Appeal was not a ruling on the merits, but only a holding that it lacked jurisdiction to entertain the appeal; and (3) lacking jurisdiction in the premises, it could not comply with

this Court's mandate by issuing a further mandate in compliance therewith to the District Court of Appeal, and returned the mandate to this Court for clarification. Thereupon, this Court, in 383 U.S. 270; 15 L.Ed. 2d 749; 86 S.Ct. 924 (1966) vacated its earlier order of April 26, 1965, which had granted the writ of certiorari to the Supreme Court of Florida, and treated the papers submitted as a petition for writ of certiorari *to the District Court of Appeal of Florida, First District*, and granted the petition and reversed the judgments.

Rule 22, respecting review on certiorari, provides that a petition to review the judgment of the state court of last resort in a criminal case shall be deemed in time when filed within 90 days after the entry of such judgment. In *Callender* it appears that the Court in effect amended the petition for purposes of directing the writ to the proper court, and Appellant submits that this liberal construction of the certiorari rules should be extended to the case at bar with respect to Rule 10 and that the Notice of Appeal be deemed amended, to reflect its true and obvious intent, as directed to the judgment of the Supreme Court of Florida.

2. **Federal Rules of Civil Procedure.** In *Foman* v. *Davis*, 371 U.S. 178; 9 L.Ed. 2d 222; 83 S.Ct. 227 (1962), the District Court entered judgment dismissing Petitioner's complaint, whereupon Petitioner filed a motion to vacate the judgment and to amend. Prior to the District Court's ruling on the motion to vacate and to amend, the Petitioner filed an appeal to the Court of Appeals. Thereafter the District Court denied the motion to vacate and to amend, and Petitioner then filed an appeal from the latter judgment. The Court of Appeals ruled that

the first appeal was premature and therefore ineffective, and that the second appeal was therefore also ineffective because it failed to specify that it was an appeal from the original judgment dismissing the complaint as well as an appeal from the second judgment denying the motion to vacate and to amend. On certiorari, this Court reversed, holding that:

> "The defect in the second notice of appeal did not mislead or prejudice the respondent. With both notices of appeal before it (even granting the asserted ineffectiveness of the first), the Court of Appeals should have treated the appeal from the denial of the motions as an effective, although inept, attempt to appeal from the judgment sought to be vacated. Taking the two notices and the appeals papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest. Not only did both parties brief and argue the merits of the earlier judgment on appeal, but petitioner's statement of points on which she intended to reply on appeal, submitted to both respondent and the court, pursuant to the rule, similarly demonstrated the intent to challenge the dismissal.
>
> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." 371 U.S. 178, 181; 9 L.Ed. 2d 222, 225.

So in the case at bar, Appellee has not been mislead or prejudiced, and Appellee has in no way suggested any

such prejudice in its Motion. Taking into consideration all other aspects of the Notice to Appeal, together with the subsequent motion for extension of time to file the jurisdictional statement, the order thereon, and the jurisdictional statement itself, Appellant's intention to seek review of the judgment of the Supreme Court of Florida herein is manifest.

3. **Federal Rules of Criminal Procedure.** In *Lemke* v. *United States*, 346 U.S. 325; 98 L.Ed. 3; 74 S.Ct. 1 (1953), an appeal had been taken prior to the entry of the judgment of the District Court. This Court, in construing Rule 37 (as it then read) held that even though the notice of appeal was prematurely filed, the appeal should not be dismissed where the notice was still on file on the date of entry of the judgment. The Court disregarded the defect as one which did not affect substantial rights.

In *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593; 95 L.Ed. 1199; 71 S.Ct. 971 (1951), the appellant had filed 206 assignments of error, and the appellee had moved to dismiss. The Court, however, stated that while the filing of an excessive number of assignments of error could justify dismissal, it nevertheless denied the appellee's motion. So in the case at bar, Appellant submits that the Court is not compelled by Rule 10, because of the oversight in question, to dismiss the appeal, but has ample discretion in the premises to treat it as harmless error.

Like results have been reached by the Courts of Appeal in their construction of Rule 37. Thus, *United States* v. *Blue*, 350 F. 2d 267 (9th Cir., 1965), presented a situation converse to that at bar, i.e., the notice of appeal failed to

state the name of the court to which the appeal was taken. However, the notice complied in all other respects with Rule 37 and the court stated: "This is precisely the sort of technical objection that the Rules were designed to eliminate." 350 F. 2d 267, 270. *Accord: United States* v. *Duncan*, 310 F. 2d 367 (7th Cir., 1962), where the court treated a letter by an indigent defendant to the clerk as a notice of appeal, did not require compliance with all "technical niceties", and held that there was *substantial compliance* with Rule 37. *Cf. United States* v. *Cannady*, 34 F.R.D. 211, 212 (D.C., 1964), where Judge Youngdahl referred to certain irregularities as simply "inconsequential omissions."

4. **State law.** In the recent case of *State ex rel. Poe* v. *Allen*, 196 So.2d 745, the Supreme Court of Florida on March 8, 1967, resolved a substantially identical problem in favor of the appellant therein. The notice of appeal had been addressed to a concededly non-appealable order denying a motion for a new trial, rather than to the final judgment itself. The Supreme Court of Florida held that the technical omission did not serve to defeat the appeal, since the appellees had not shown that they were prejudiced thereby. The Court stated that:

> "the defective notice contains information by use of which the matter appealed can be discovered in the record with at least the reasonable degree of certainty required by . . . preceding rulings." 196 So.2d 745, 746.

The Court added that:

> "The significant factors . . . . are proper indentification of the litigation in the notice, a clear intent

to prosecute an effective appeal, specification of errors reviewable only upon appeal from the final judgment, presentation of a record sustaining such an appeal, and the absence of any record basis for genuine prejudice as a result of the defective notice." 196 So.2d 745, 746.

The Court relied upon the more liberal view now obtaining in other jurisdictions, and in particular upon the rule prevailing in Federal courts, citing Barron & Holtzoff, Federal Practice and Procedure, viz.:

> "Where the appeal is erroneously taken from the order denying the motion, rather than from judgment, the sound course undoubtedly is to treat the technical error as harmless, and to consider the appeal as if it were from the judgment * * *" Vol. 3, p. 347, Sec. 1302.01.

CONCLUSION

Appellant submits, *in fine*, that the Motion to Dismiss in no way suggests that the Federal Question presented on the merits is insubstantial, but relies solely upon a non-prejudicial technicality. As the Court stated long ago in *Mutual Life Insurance Company* v. *Phinney*, 178 U.S. 327, 337; 44 L.Ed. 1088, 1093 (1900):

> "While we have always been careful to see that the required order of procedure has been complied with before any case shall be considered as transfered from a lower to a higher court that the party seeking a review must act in time and must make a substantial compliance with all that the

> statute prescribes, at the same time we have been equally careful to hold that no mere technical omission which did not prejudice the rights of the defendant in error should be made available to oust the appellate court of jurisdiction."

For the foregoing reasons, therefore, Appellant respectfully prays the Court to deny the Motion to Dismiss.

Respectfully submitted,

By_____

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CERTIFICATE OF SERVICE

I, ALFRED I. HOPKINS, Counsel for Appellant and a member of the Bar of the Supreme Court of the United States, hereby certify that on May ____, 1967, I served a copy of the foregoing Appellant's Response to Motion to Dismiss Appeal on the Appellee by mailing a copy thereof in a duly addressed envelope with air mail postage prepaid to Hon. Earl Faircloth, Attorney General of the State of Florida, Capitol Building, Tallahassee, Florida.

ALFRED I. HOPKINS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

DELANEY *v.* FLORIDA.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 1213. Decided May 29, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.